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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SON NGOC NGUYEN, Defendant and Appellant.	G040588 (Super. Ct. No. 05WF2438) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, Tami Falkenstein Hennick, and Lynn McGinnis Deputy Attorneys General, for Plaintiff and Respondent.

Son Ngoc Nguyen appeals from a judgment after a jury convicted him of special circumstances murder, premeditated and deliberate attempted murder, carrying a firearm concealed within a vehicle while being an active participant in a criminal street gang, and street terrorism, and found true street terrorism and firearm enhancements. Nguyen raises many arguments that can be categorized under two broad topics: insufficient evidence supports the jury's verdicts; and the trial court erroneously instructed the jury.

As we explain below more fully, because we agree insufficient evidence supports his convictions for murder and attempted murder, we need not address many of his other claims. His contentions insufficient evidence supports his conviction for street terrorism and the trial court erroneously instructed the jury on street terrorism have no merit. We reverse his convictions for murder and attempted murder, affirm the judgment in all other respects, and remand the matter to the trial court for resentencing.

FACTS

June 29, 2005-Counts 3 and 4

Officers Timothy Walker and Edward Esqueda stopped a car with a broken taillight. Nguyen was driving the car, and Luan Luong was sitting in the front passenger seat; there was a third man in the back seat. After having the men get out of the car, officers found a loaded .22-caliber pistol under the front passenger seat. Officers arrested Luong and released Nguyen and the other man.

July 22, 2005-Counts 1 and 2

The following month, Huong Nguyen (Huong), Dung Nguyen (Dung), Monalisa Tran (Monalisa), Suong "Cindy" Tran (Suong), and Huy[1] (Huy) went to the Shark Club. Huong drove the group in his car and arrived at approximately 10:00 p.m. About midnight, Tri Duong (Tri) drove Tri "Boney" Huynh (Boney), Yen Nguyen (Yen),

[1] The record does not include Huy's last name.

and a fourth person to the Shark Club in his car. Club security patted down both parties before they entered the club.

At some point, Dung told Huong that Boney was at the club. A year prior, Huong loaned Boney $1,300, and despite Huong's repeated attempts to collect the loan, Boney had not repaid him. As Boney was exiting the club, Dung "dragged" Huong outside. Huong, with Dung nearby, confronted Boney, who was with Yen, about repayment of the loan. Boney responded, "'What are you going to do about it?'" At some point, Dung bumped into Boney, and there was arguing and pushing. The club's security guards separated the men. Around 1:00 a.m., Tri and Yen forced Boney into Tri's car, and they left. About 10 minutes later, Huong and Dung, and the three others they arrived with, got into Huong's car and left.

As Tri drove Boney home, Boney was angry and he made telephone calls. Boney called Huong and after several telephone calls, they agreed to meet at the Hai Do Restaurant.

During one of Boney's telephone calls, he told someone, "'Motherfucker, do you want to start something with me?'" When others in the car tried to soothe him, Boney said, "'You guys don't know anything. It's my problem. They want to fight me[.]'" Boney also called Nguyen. Nguyen refused Boney's dinner invitation during their first telephone call, but during their second call, Nguyen agreed to pick up Boney, who said he was intoxicated and stranded. Tri dropped off Boney and Yen at Boney's home. Boney went to look for his uncle's car but could not find it, and he and Yen went inside, and Boney put on a baseball hat. Boney went outside to wait for Nguyen, and Yen followed him.

As Nguyen drove to the agreed upon meeting spot, Boney called him repeatedly and told him to hurry up. When Nguyen arrived, Boney entered the car and told him to drive to the Hai Do Restaurant so he could meet his "homeboy." Overhearing where Boney was going, Yen followed in her car fearing trouble.

Meanwhile, Huong and his passengers arrived at the Hai Do Restaurant. Huong, Dung, and Huy got out of the car, and Dung and Huy went inside, while Huong waited outside; Suong stayed in the car. Huong called Boney and said he was at the restaurant and Boney said he was on his way. Dung walked out of the restaurant, kneeled on the ground, and put his fingers in his mouth to make himself vomit.

Suong saw Nguyen drive his car and stop behind Huong's car. Huong called Boney again, and Boney said he was at the restaurant and told Huong to "'step out.'" Huong said he was outside. Boney walked to Huong's car and Suong saw a gun in Boney's waistband. Suong and Monalisa saw Boney pull the gun from his waistband before he ran away.

Huong saw Boney walk around the corner. Boney pulled a gun from his waistband and started shooting at Huong. Huong turned and ran into the restaurant, while Boney continued shooting. As Dung knelt on the ground, Boney walked towards him and fired several rounds into his head. Boney ran back to Nguyen's car and got in, and Nguyen began to drive away. Suong, who had moved to the driver's seat of Huong's car, drove and collided with Nguyen's car, but he drove away. Huong and Huy put Dung in Huong's car and took him to the hospital, where he was later pronounced dead—he had been shot in the head three times from less than five inches away.

Later that evening, Boney called Yen on Nguyen's telephone. He asked her to pick him up and take him to a friend's house, which she did.

Through an examination of Boney's telephone records, Walker identified Nguyen as a suspect in the shootings. Walker telephoned Nguyen and asked him to come to the police station. When Nguyen did not show up, Walker arranged with Nguyen's mother to apprehend him. Nguyen avoided the trap and led officers on a high speed chase, eventually escaping capture. Two months later, officers arrested Nguyen. Nguyen said he fled because he knew officers were trying to apprehend him and he was under the influence of drugs.

Walker interviewed Nguyen. Nguyen stated he met Boney the day of the incident, and drove him to the Hai Do Restaurant to meet his "homeboys." Nguyen said "They will get [him]." When Walker asked Nguyen whether Boney showed him what Boney had in his possession, Nguyen responded, "No, not until after that." Nguyen explained that after Boney called him and he picked him up, he drove him to the restaurant. Boney told him to park in the back and wait for him while he went to meet his friend. Nguyen said that while he waited, he heard a gunshot, and Boney ran back to the car. Nguyen stated he drove away and dropped off Boney. Nguyen said he and Boney were not friends, but he gave him a ride because Boney was nice to him. Nguyen admitted he knew Boney was a Tiny Rascals gang member. Nguyen claimed he did not see anything in Boney's hand while he was in the car or when he got out and walked away. And he could not remember if Boney was on the telephone as they drove to the restaurant. Nguyen again stated he did not see a gun when Boney walked to the restaurant. Nguyen stated that when Boney ran back to the car, he thought someone was shooting at them. He saw the gun as he fled the scene. Nguyen stated Boney was an "old head." He was familiar with the Viet Family gang. When Walker asked him whether gang members typically commit crimes with people they can trust, Nguyen replied, "yeah." Nguyen then admitted he met Boney before the day of the incident, but they were not friends. Nguyen denied he was a Viet Family gang member. When Walker asked him about bullet holes in his car, Nguyen said he cut someone off and a "Mexican" shot at him. Nguyen stated he did not report the shooting to the police because Boney is a member of the Tiny Rascals gang. He was afraid Boney or his confederates were going to kill him. Nguyen stated Boney never told him that he was going to shoot someone. Nguyen then admitted that when he drove Boney to the restaurant, Boney was on the telephone, but he seemed "normal." When Walker asked Nguyen whether it was true that if an "OG [Old or Original Gangster]" in the Tiny Rascals gang was in a fight with a rival it was probable somebody could be killed, Nguyen responded, "Yeah." Nguyen could

not explain why because he was not friends with Boney and was afraid Boney would kill him. Nguyen said that as he drove Boney to the restaurant he was suspicious something was going to happen, but he did not think Boney was going to shoot someone. Nguyen then admitted Boney called him and asked for a ride because he trusted him. When Walker questioned Nguyen about Boney's demeanor before the shooting and described him as "enraged and scared," Nguyen said, "He's always like that. That's him. [¶] . . . [¶] He's [a] hothead."

An information charged Nguyen with special circumstances murder by lying in wait and to further the activities of a criminal street gang (Tiny Rascals) (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(15), (22))[2] (count 1, Dung Nguyen), premeditated and deliberate attempted murder (§§ 664, subd. (a), 187, subd. (a)) (count 2, Huong Nguyen), carrying concealed within a vehicle a firearm while being an active participant in a criminal street gang (§ 12025, subds. (a)(1), (b)(3)) (count 3), and street terrorism (Viet Family) (§ 186.22, subd. (a)) (count 4). The information alleged Nguyen committed counts 1 and 2 for the benefit of a criminal street gang (Tiny Rascals) (§ 186.22, subd. (b)(1)(C)). The information also alleged Nguyen committed count 3 for the benefit of a criminal street gang (Viet Family) (§ 186.22, subd. (b)(1)(A)). Finally, the information alleged he committed count 1 while being a gang member and vicariously discharging a firearm and causing death (§ 12022.53, subds. (d), (e)(1)), and alleged he committed count 2 while being a gang member and vicariously discharging a firearm (§ 12022.53, subds. (c), (e)(1)).

At trial, the prosecutor offered Huong's testimony. Huong testified that Dung bumped into Boney at the Shark Club. When the prosecutor asked him whether Dung got into Boney's "face[,]" Huong replied, "I heard, but never."

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[2] All further statutory references are to the Penal Code, unless otherwise indicated.

The prosecutor offered the testimony of Tri, who drove Boney to the Shark Club. He testified club security pats down everyone who enters the Shark Club. When shown a DVD recording of the Shark Club entrance on the night of the shooting, Tri identified Boney as a person being patted down before entering the club. Tri stated he did not see Boney with a gun that night, and he did not have a gun in his car or give Boney a gun.

The prosecutor also offered Trami Nguyen's (Trami) testimony. Trami testified she was Yen's friend. Trami admitted she told police Yen told her that Boney got into a fight at the Shark Club and he got a gun from a "homeboy" and solved the problem. She testified, however, her statement about the gun was based on rumors.

Yen also testified for the prosecution in exchange for the prosecutor dismissing an accessory after the fact charge against her. Yen explained she never told Trami that Boney got into a fight at the Shark Club and acquired a gun to settle the dispute. Yen repeatedly denied seeing Boney with a gun at any point during the evening. Nor was she aware of him being a gang member. She stated that a couple months after the shooting she went to Ohio to visit Boney.

Finally, the prosecutor offered Walker's testimony. Walker, a gang expert, was the lead investigator in this case. After detailing his background, training, and experience, Walker testified concerning the culture and habits of Asian criminal street gangs. He explained the importance of guns in gangs and how gang members use guns to commit violent acts and enhance their reputation with other gangs. He said gangs have "gang guns" that are shared with gang members to commit crimes and passed around to avoid detection. He stated that as technology makes communicating easier and quicker, gang members communicate with confederates and rival gang members to boast about the violent crimes they commit. Walker explained that when a gang member is disrespected, harsh retaliation is required to instill fear with other gangs and within the community. He also opined that along with respect, trust is one of the core values in a

gang, and a gang member would not commit a crime with someone he does not trust. He added a gang member becomes trusted by participating in violent crimes, and acting as a getaway driver is one such role. Walker stated Asian street gangs are mobile and tend not to be territorial or claim any particular territory. He stated that because of their mobility they tend to have more allies, but they also have rivals and tend to congregate in particular areas.

Walker testified concerning the history and culture of Tiny Rascals, a nationwide gang, their primary activities (assault with a deadly weapon and murder), and the required predicate offenses. Based on his investigation of this case, Boney's prior contacts with law enforcement, and Boney's statements to law enforcement, Walker opined Boney was an active participant in Tiny Rascals at the time of the incident.

Walker testified concerning the history and culture of Viet Family, primarily an Orange County gang, their primary activities (assault with a deadly weapon, burglary, sale of narcotics, possession of weapons, and murder), and the required predicate offenses. Walker opined that at the time of the offenses, Nguyen was an active participant in Viet Family even though he denied membership based on the following: (1) police contacts—in July 2004, Nguyen was with two known Viet Family gang members at a park; in February 2005, Nguyen was at a known Viet Family hangout with another Viet Family gang member; and in March 2005, Nguyen was at a known gang hangout with another Viet Family gang member; (2) the June 25, 2005, incident—when officers pulled over Nguyen, he was with known Viet Family gang members, one of whom later told Walker that Nguyen associated with Viet Family and was expected to back up the gang; and (3) the July 23, 2005, incident—immediately after the shootings, Nguyen spoke on the telephone with two known Viet Family gang members, he fled to the vicinity of a known Viet Family gang member and abandoned his car there, and he was arrested near the home of a known Viet Family gang member; and (4) Nguyen was knowledgeable about criminal street gang culture.

Based on a hypothetical identical to the facts in this case, Walker opined a hypothetical gang member would have knowledge of his gang's pattern of criminal activity because he must "be aware of the activities that [his] gang is involved in because it could be a life-or-death situation at any given point in time." Based on a hypothetical mirroring the facts of the June 29, 2005, incident Walker opined the offenses were committed for the benefit of a criminal street gang (Viet Family) because "[a]t any given point in time, they could come across a rival gang member; and to have a loaded firearm in your car with three other active participants in the gang, everyone in that car needs to know if there's a gun in that car because at any point in time any one of those could have to use the gun . . . if they were to come across a rival gang member." He also opined the offenses were committed with the specific intent to promote a criminal street gang (Viet Family) because a gang member can use the gun to create violence and enhance his and the gang's reputation in the community. Based on a hypothetical mirroring the facts of the July 22, 2005, incident Walker opined the offenses were committed for the benefit of a criminal street gang (Tiny Rascals) because a gang member was disrespected and he retaliated violently, which enhances the reputation of the gang, and the other gang member assisted by acting as the getaway driver. He also opined the offenses were committed with the specific intent to promote a criminal street gang (Tiny Rascals) for the same reason.

The jury convicted Nguyen of all counts and found true all the special circumstances and enhancements. After the trial court denied his new trial and *People v. Dillon* (1983) 34 Cal.3d 441, motions, the court sentenced him to the following: count 1, life without the possibility of parole plus a consecutive term of 25 years and count 2, life with the possibility of parole consecutive to count 1 plus a consecutive term of 20 years.

DISCUSSION

I. Sufficiency of the Evidence

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citations.] [¶] "'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

A. Murder and Attempted Murder

Nguyen argues there was insufficient evidence to support his convictions for the murder of Dung and the attempted murder of Huong. We agree.

"Murder is the unlawful killing of a human being, . . . with malice aforethought." (§ 187, subd. (a).) "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) Murder in the first degree is murder that is willful, deliberate, and premeditated. (§ 189.) "'Attempted murder requires the specific intent to kill and the commission of a direct but

ineffectual act toward accomplishing the intended killing.' [Citations.]" (*Smith, supra,* 37 Cal.4th at p. 739.) "'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*Smith, supra,* 37 Cal.4th at p. 739.)

There is no dispute Nguyen did not personally perpetrate Dung's murder or Huong's attempted murder. Rather, the prosecutor proceeded on the theory Nguyen was vicariously liable for both crimes as an aider and abettor. The trial court instructed the jury on both aiding and abetting and the natural and probable consequences doctrine. Consequently, we must determine whether sufficient evidence supports Nguyen's convictions for murder and attempted murder under either theory. In so doing we must view the evidence in the light most favorable to the prosecution and we must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Smith, supra,* 37 Cal.4th at pp. 738-739.)

1. Traditional Aiding and Abetting

"To be guilty of a crime as an aider and abettor, a person must 'aid[ ] the [direct] perpetrator by acts or encourage[ ] him [or her] by words or gestures.' [Citations.] In addition, . . . [citations] . . . , the person must give such aid or encouragement 'with knowledge of the criminal purpose of the [direct] perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of,' the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must 'know[ ] the full extent of the [direct] perpetrator's criminal purpose and [must] give[ ] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

Nguyen concedes he facilitated Boney's attack—he was his driver. But Nguyen insists he had no knowledge of Boney's intent to kill anyone when he drove

Boney to the restaurant. He asserts there is insufficient evidence to prove otherwise. Again, we agree.

There is no direct evidence to prove Nguyen shared Boney's intent to kill. Rather, the prosecutor relied on circumstantial evidence to prove Nguyen's intent to kill. Intent may be shown by circumstantial evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 35.) We now turn to the record to identify the facts from which we may draw inferences of Nguyen's intent.

It is undisputed Nguyen was not present earlier in the evening when Boney encountered Dung and Huong at the Shark Club. Nor is there any evidence anyone told Nguyen what occurred at the club. What the evidence does show is that at some point after the incident at the Shark Club, Boney called Nguyen and invited him to dinner. Nguyen refused this invitation. During a second telephone conversation with Boney, Boney claimed to be intoxicated and stranded. Nguyen agreed to pick up Boney. When Nguyen arrived, Boney told Nguyen to drive him to the Hai Do Restaurant so he could meet his "homeboy." Although there was evidence Nguyen was suspicious something was going to happen, the record is devoid of any evidence Boney told Nguyen he had a gun or what was his real purpose for going to the restaurant.

As Nguyen drove to the restaurant, Boney called Huong and told him he was on his way. Prior to Nguyen arriving at the restaurant, Huong and his confederates arrived. Huong's car was parked outside the restaurant and when Nguyen arrived, he stopped behind Huong's car. After arriving at the restaurant, Huong and Boney spoke on the telephone. Boney told Huong to "step out," and Huong told Boney he was outside. Boney left Nguyen's car and walked to Huong's car, pulled a gun from his waist band, and started shooting. Huong escaped into the restaurant, but Boney encountered Dung who was kneeling on the ground and fired several shots into his head. Boney then ran back to Nguyen's car, got in, and Nguyen drove away.

In an interview with law enforcement, Nguyen admitted driving Boney to the restaurant to meet his "homeboy," but he repeatedly denied knowing Boney had a gun until after the shooting had occurred. He denied seeing anything in Boney's hand in the car or when Boney got out and walked away, and he denied Boney ever told him he was going to shoot someone. Nguyen said he parked in the back of the restaurant and waited as Boney had asked. While he waited, Nguyen heard a gunshot, and Boney ran back to the car. Nguyen explained he drove away after Boney returned to the car because he thought someone was shooting at them.

Initially, Nguyen stated he could not remember if Boney was talking on the phone as they were driving to the restaurant but later admitted he had overheard Boney talking on the phone, and said Boney seemed "normal" while on the phone. Nguyen described Boney as being enraged and scared on the way to the restaurant and indicated Boney "is always like that. He's [a] hothead." Initially, Nguyen claimed he had just met Boney the night of the incident. Later, he admitted knowing Boney before the shooting but denied they were friends. Nguyen stated he knew Boney was a member of Tiny Rascals and this is why he feared him. Fearing Boney or his confederates would kill him, Nguyen explained he did not report the shooting to the police. Nguyen could not explain why he was not friends with Boney or why he was afraid of Boney. Contrary to Walker's opinion, Nguyen denied being a member of Viet Family.

During his conversation with Walker, Nguyen made a number of inconsistent and contradictory statements regarding his familiarity with Boney. It was only after persistent questioning by Walker that Nguyen eventually admitted he was better acquainted with Boney than he had indicated at the outset. The most significant changes in Nguyen's story were his admission he was aware Boney was a gang member, his statement it was normal for Boney to be enraged and scared, and that he believed Boney was a hothead. But as troubling as Nguyen's false statements to law enforcement may be, such lack of candor is insufficient to support an inference Nguyen knew Boney

had a gun or shared Boney's intent to kill Dung and Huong. (See *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 839 [inferences from false alibi do not support murder accusation].)

The existence of evidence establishing that on the way to the restaurant Nguyen knew Boney had a gun could be a fact from which an inference of the requisite intent could be drawn. However, contrary to the Attorney General's claim, a review of the record does not reveal any such evidence. The fact Boney did not have a gun when he entered the Shark Club and that his friends did not see him with a gun does not establish Nguyen provided him with the gun or knew he had a gun. There is no evidence Boney exhibited the gun in Nguyen's presence prior to the shooting. There is no admission by Nguyen that he saw the gun prior to the shooting or that Boney ever told Nguyen he had a gun. Nguyen did not get out of the car at the restaurant and go with Boney when he confronted Huong and Dung. Regardless of whether Boney knew Dung and Huong would be at the restaurant, we conclude no facts surrounding the commission of the crime support an inference Nguyen shared Boney's intent to kill them.

Other relevant circumstantial evidence that could give rise to an inference that would support a finding Nguyen shared Boney's intent was Walker's expert opinion concerning gang membership. Walker opined Boney was a member of Tiny Rascals and Nguyen was a member of Viet Family. If there was sufficient evidence to establish the murder of Dung and the attempted murder of Huong were gang crimes, such evidence could be relevant in determining whether Nguyen had the requisite intent to kill. Walker testified concerning the culture and habits of Asian gangs. He stated gangs have "gang guns" that are shared with gang members and passed around to avoid detection. But there was no evidence tending to prove Nguyen and Boney were acting as gang coconspirators the night of the shooting or that shooting was gang business. The evidence established Boney had a confrontation earlier in the evening with Huong over a debt. There was no evidence that during the shooting, or at anytime leading up to the

shooting, this was anything other than a dispute over a debt. And evidence Nguyen called his gang colleagues *after* the shooting do not prove he knew of and shared an intent to kill *before* the shootings.

Gang experts routinely testify it is important for gangs to claim responsibility, or "credit," for their crimes. Gangs frequently accomplish this by traveling in the company of their fellow gang members, wearing gang clothing or colors, throwing gang signs, calling out their gang name, or shouting out statements that disrespect the rival gang. Walker likely did not testify regarding the typical ways in which gangs claim responsibility because such evidence was lacking in this case. Gang experts also routinely testify gang members only commit crimes with people they trust. The inference the jury was asked to draw from this evidence was Boney could rely on Nguyen to be his wheel man and, therefore, Nguyen shared Boney's intent to kill. But without other circumstantial evidence supporting a finding Nguyen shared Boney's intent to kill, this is too speculative. An equally reasonable inference is Boney told Nguyen he was going to meet his "homeboy" and did not share his plans because he was concerned Nguyen would flee when he got out of the car at the restaurant. There is insufficient evidence to establish these crimes were gang crimes and to support a reasonable inference Nguyen would have known Boney's intentions.

Under the traditional aiding and abetting doctrine, an aider and abettor must aid or encourage the perpetrator with knowledge of the criminal purpose of the perpetrator and with the intent to commit the intended crime. If the intended crime requires a specific intent, the aider and abettor must share the specific intent of the perpetrator. Here, the record does not support the conclusion Nguyen shared Boney's specific intent to kill.

Finally, the Attorney General relies on *People v. Stone* (2009) 46 Cal.4th 131 (*Stone*), to argue it is irrelevant who he intended to kill so long as he intended to kill someone. *Stone* is inapposite as it involved the issue of whether the trial

court erroneously instructed the jury on the kill zone theory, which involves the situation where a person intends to kill a particular target, and also kills others within that zone. The kill zone theory typically arises in situations where by one act, a defendant killed or attempted to kill multiple people, such as by placing a bomb on an airplane or firing a flurry of bullets into a fleeing car. (*Id.* at p. 137.) Here, Boney fired his gun at Huong who fled, and then Boney walked towards Dung and shot him in the head. Simply put, this is not a kill zone case.

2. Natural and Probable Consequences Doctrine

We now turn to another theory of vicarious liability—the natural and probable consequences doctrine. In *People v. Prettyman* (1996) 14 Cal.4th 248, 261, the Supreme Court reiterated the principles of natural and probable consequences. "'[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.] Thus, . . . a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime."

"Therefore, when a particular aiding and abetting case triggers application of the 'natural and probable consequences' doctrine . . . the trier of fact must find that the defendant, act[ed] with (1) knowledge of the unlawful purpose of the perpetrator; and

(2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Prettyman, supra*, 14 Cal.4th at p. 262, fn. omitted.)

Under the natural and probable consequences doctrine, even if Nguyen did not share Boney's specific intent to kill Dung and attempt to kill Huong, he could be liable for those crimes if Nguyen shared Boney's intent to commit assault with a firearm, simple assault, or disturbing the peace. As we explain above more fully, there was no evidence Nguyen provided Boney with a gun or knew Boney had a gun before the shootings.

Similarly, there was no evidence Nguyen knew of and shared Boney's intent to commit simple assault or disturbing the peace. Again, the evidence demonstrated Nguyen picked up Boney and drove him to the restaurant to meet his "homeboy." Although Nguyen knew Boney was a Tiny Rascals gang member and a "hothead," and he was suspicious something was going to happen, there was no evidence Nguyen shared his intent to commit any of the target crimes. There was no evidence Nguyen knew who Boney was going to meet or his purpose for going to the restaurant. Assuming without deciding the murder and attempted murder were the natural and probable consequences of a simple assault or disturbing the peace, the record is void of any evidence Nguyen with knowledge of Boney's unlawful purpose aided and abetted those crimes. Nguyen's presence at the scene of the crime is insufficient to establish aiding and abetting liability. (*People v. Em* (2009) 171 Cal.App.4th 964, 970.)

The Attorney General's reliance on *People v. Montes* (1999) 74 Cal.App.4th 1050 (*Montes*), another case from this court, is misplaced. In *Montes*, a confrontation between rival gangs quickly escalated into a street brawl that culminated in the shooting of one of the participants. The court affirmed an aider and abettor's conviction of attempted murder, despite lack of evidence he knew his confederate was armed with a gun. The court held that in the context of a gang confrontation, a jury may find murder is the natural and probable consequence of "targeted offenses of simple assault and breach of the peace for fighting in public," regardless of whether participants knew weapons were on hand. (*Id.* at p. 1055.) The court stated, "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them. Given the great potential for escalating violence during gang confrontations, it is immaterial whether Montes specifically knew Cuevas had a gun." (*Id.* at p. 1056.)

Here, unlike *Montes*, the violence did not arise out of a clash between gangs. There is no evidence Nguyen engaged in any joint conduct with Boney from which it was reasonably foreseeable gunfire or physical violence would result. Nguyen did not confront the victims, nor was he present when Boney did. Nguyen did not encourage or support Boney's actions other than to drive him to the restaurant. The record includes no evidence he knew of and aided and abetted any of the target offenses. Therefore, the record does not include evidence supporting Nguyen's convictions of counts 1 and 2 under traditional aiding and abetting principles or under the natural and probable consequences doctrine. Because we have reversed Nguyen's convictions on counts 1 and 2, we need not address his arguments insufficient evidence supports the jury's true findings on the lying in wait and criminal street gang special circumstances, or his contentions insufficient evidence supports the jury's true findings on the street terrorism enhancements as to each of those counts.

B. Street Terrorism

Nguyen argues insufficient evidence supports the conclusion he knew Viet Family gang members engaged in a pattern of criminal gang activity. We disagree.

Count 4 charged Nguyen with the substantive offense of street terrorism. This offense, section 186.22, subdivision (a), provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years." Count 3 charged him with carrying a firearm concealed within a vehicle while being an active participant in a criminal street gang (§ 12025, subds. (a)(1), (b)(3)). Both offenses required the jury to conclude Nguyen "kn[ew] that its members engage in or have engaged in a pattern of criminal gang activity" at the time of the June 29, 2005, incident.

We note Nguyen does not contend the evidence failed to establish Viet Family gang members engaged in a pattern of criminal gang activity. His sole claim is he did not have knowledge of it. The record belies this argument.

The prosecutor presented Walker with a hypothetical mirroring the facts of this case and asked him whether a Viet Family gang member "would have knowledge of [the gang's] pattern of criminal gang activity." Walked opined a hypothetical Viet Family gang member would have knowledge of the gang's pattern of criminal gang activity because Asian gangs are mobile and "they need to be aware of the activities that [his] gang is involved in because it could be a life-or-death situation at any given point in time. If they're out and they don't know what's going on, the current activities with the gang, and they get confronted by a rival gang member that they might not know exactly what the—what the animosity is, I guess, with that gang, if there was just a recent incident that occurred or whether they were neutral with a gang at one point but something happened overnight to make them enemies, they need to be aware of the

activities their gang is doing so they're prepared when they're out on the streets . . . ." Walker also opined technology makes communicating easier and quicker, and gang members communicate with confederates and rival gang members to boast about the violent crimes they commit. Finally, Walker testified that immediately after the July 23, 2005, shootings, Nguyen spoke on the telephone with two known Viet Family gang members.

Walker's expert opinion concerning criminal street gangs and the evidence concerning Nguyen calling Viet Family gang leaders after the shootings was sufficient evidence for the jury to reasonably conclude Nguyen had knowledge of Viet Family's pattern of criminal gang activity at the time of the June 29, 2005, incident.

Nguyen contends Walker's testimony did not establish the knowledge element for the following reasons: (1) his testimony was circular because the form of the hypothetical assumed that which is sought to proved; (2) his response to the hypothetical only established Viet Family's primary criminal activities, and not his knowledge as to the gang's pattern of criminal gang activity; (3) he testified concerning an ultimate issue in the case, Nguyen's knowledge; and (4) Walker admitted Nguyen had not been issued a STEP card, the typical method in which this statutory element is proved.

As to his first claim, the fact the prosecutor asked hypothetically whether an "active participant in the gang" would have the requisite knowledge, did not detract from the relevancy of Walker's opinion, and the prosecutor's question was not evidence and did not establish the fact sought to be proved. With respect to his second claim, Walker opined Viet Family's primary activities were aggravated assaults, burglaries, drug sales, weapons possession, and murders. At least two of those crimes, assaults and murders, have a direct relation to rival gangs. Next, Walker's testimony was not an expression of how he thought the case should be decided—it was a response to the hypothetical question that mirrored the facts of the case, which is permissible. Finally, the fact Nguyen may not have been given a STEP notice does not establish he did not

have knowledge of Viet Family's pattern of criminal gang activity. That a defendant was at some point served with a STEP notice is one way to establish the knowledge element, but it is not the only way.

II. Jury Instructions[3]

A. CALCRIM No. 1400

Nguyen argues we must reverse his conviction on counts 3 and 4 because the trial court erroneously instructed the jury with CALCRIM No. 1400, "Active Participation in Criminal Street Gang." Specifically, he claims CALCRIM No. 1400 erroneously defined felonious criminal conduct as murder or attempted murder, offenses which occurred *after* he was alleged to have actively participated in Viet Family. The Attorney General concedes the instructional error but argues it was harmless. We agree with the Attorney General.

CALCRIM No. 1400 provides: "The defendant is charged in [c]ount 4 with participating in a criminal street gang. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant actively participated in a criminal street gang; [¶] 2. When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; [¶] AND [¶] 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: a. directly and actively committing a felony offense; [¶] OR [¶] b. aiding and abetting a felony offense. [¶] *Active participation* means involvement with a criminal street gang in a way that is more than passive or in

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[3] Because we reverse Nguyen's convictions on counts 1 and 2, we need not address his contentions the trial court erroneously instructed the jury with the following Judicial Council of California Criminal Jury Instructions (2008): No. 520, "Murder with Malice Aforethought"; No. 521, "Murder: Degrees"; No. 728, "Special Circumstances: Lying in Wait"; No. 736, "Special Circumstance: Killing by Street Gang Member"; and No. 334, "Accomplice Testimony Must Be Corroborated: Dispute Whether Witness is an Accomplice."

name only. [¶] The People do not have to prove that the defendant devoted all or a substantial part of his time or efforts to the gang, or that he was an actual member of the gang. [¶] A *criminal street gang* is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities the commission of murder, aggravated assault, or residential burglary; [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. In order to qualify as a primary activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group. [¶] A pattern of criminal gang activity, as used here, means: [¶] 1. The commission of, or conspiracy to commit, or solicitation to commit, or conviction of, or having a juvenile petition sustained for the commission of any combination of two or more of the following crimes or two or more occurrences of one or more of the following crimes: assault with a machine gun, assault with a deadly weapon, murder, shooting at an occupied vehicle, robbery, kidnapping, or burglary; [¶] AND [¶] 2. At least one of those crimes was committed after September 26, 1988[;] AND [¶] 3. The most recent crime occurred within three years of one of the earlier crimes; [¶] AND [¶] 4. The crimes were committed on separate occasions or were personally committed by two or more persons. [¶] The People need not prove that every perpetrator involved in the pattern of criminal gang activity, if any, was a member of the alleged criminal street gang at the time when such activity was taking place. [¶] The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related. [¶] If you find the defendant guilty of [c]ounts 1, 2, or 3 in this case, you may consider that crime in deciding whether one of the group's primary activities was commission of that crime, and whether a pattern of criminal gang activity has been proved. [¶] You may not find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements

were committed, but you do not have to all agree on which crimes were committed. [¶] As the term is used here, a *willful act* is one done willingly or on purpose. [¶] *Felonious criminal conduct* means committing any of the following crimes: murder or attempted murder. [¶] To decide whether a member of the gang or the defendant committed murder or attempted murder, please refer to the separate instructions that I have given you on those crimes. [¶] To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that: [¶] 1. A member of the gang committed the crime; [¶] 2. The defendant knew that the gang member intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; [¶] AND 4. The defendant's words or conduct did in fact aid and abet the commission of the crime. [¶] Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose, and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor. [¶] A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things: [¶] 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime[;] [¶] AND [¶] 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory."

CALCRIM No. 2542, "Carrying Firearm: Active Participant in Criminal Street Gang," states: "If you find the defendant guilty of unlawfully carrying a concealed firearm within a vehicle or causing a firearm to be carried concealed within a vehicle under [c]ount 3, you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang. [¶] To prove this allegation, the People must prove that: [¶] 1. When the defendant carried the firearm or caused the firearm to be carried concealed in a vehicle, the defendant was an active participant in a criminal street gang; [¶] 2. When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; [¶] AND [¶] 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: [¶] a. Directly and actively committing a felony offense; [¶] OR [¶] b. [A]iding and abetting a felony offense. [¶] *Active participation* means involvement with a criminal street gang in a way that is more than passive or in name only. [¶] The People do not have to prove that the defendant devoted all or a substantial part of his time or efforts to the gang, or that he was an actual member of the gang. [¶] A *criminal street gang* has been defined in another instruction, i.e., CALCRIM [No.] 1400. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved."

CALCRIM No. 1400 erroneously defined "felonious criminal conduct" as murder or attempted murder because these crimes occurred one month after the incident alleged in counts 3 and 4. The Attorney General concedes the shootings could not form the basis of the felonious criminal conduct required under counts 3 and 4. CALCRIM No. 1400 should have defined the felonious criminal conduct as "carrying firearm: active participant in criminal street gang," the conduct underlying the count 3 offense. Indeed, during closing argument this is the offense the prosecutor argued was

the felonious criminal conduct. Having concluded there was instructional error, we must now determine whether the error was prejudicial. We conclude it was not.

Both Nguyen and the Attorney General assert the proper standard of review is articulated in *People v. Watson* (1956) 46 Cal.2d 818. However, this is not a situation where there was a factual error in the jury instruction. We are presented with the situation where the instruction was legally incorrect because it erroneously described an element of the offense.

"An instructional error that improperly describes or omits an element of the crime from the jury's consideration is subject to the 'harmless error' standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 . . . . [Citation.] We thus consider whether it appears beyond a reasonable doubt that the instructional error did not contribute to the jury's verdict. [Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 526.)

We begin by noting Nguyen does not challenge the sufficiency of the evidence on count 3, or the propriety of instructing the jury felonious criminal conduct was "carrying firearm: active participant in criminal street gang." There was overwhelming evidence Nguyen was guilty of count 3 as officers found a loaded firearm in his car while he was in the company of two known Viet Family gang members. He does not contest the sufficiency of the evidence on any of the element of the substantive offense of street terrorism, other than the knowledge element addressed above. We recognize CALCRIM No. 2542 includes a reference to felonious criminal conduct, which was defined in CALCRIM No. 1400 as murder or attempted murder. But we are convinced beyond a reasonable doubt that had the trial court properly instructed the jury on the definition of felonious criminal conduct, it would have convicted Nguyen of counts 3 and 4. Therefore, Nguyen was not prejudiced by the erroneous instruction.

DISPOSITION

We reverse Nguyen's conviction on counts 1 and 2, and we affirm the judgment in all other respects. We remand the matter to the trial court for resentencing.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.